UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 97-36-B-C***
	)	***(Civil No. 99-171-B-C)***
TROY JAMES UPHAM,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT=S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. ' 2255

Petitioner Troy James Upham filed the instant motion on July 6, 1999 and a supporting memorandum on July 12, 1999. Motion Under 28 USC ' 2255 To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Motion") (Docket No. 114) at 1; Memorandum of Law in Support of Petitioner's Title 28 U.S.C. s. 2255 Motion To Vacate, Set Aside, or Correct Sentence. ("Memorandum") (Docket No. 115) at 1. I determined that an evidentiary hearing was required with respect to Upham's claim of juror bias/misconduct and its effect, if any, on his right to a fair trial. Procedural Order (Docket No. 131). I also directed that counsel be appointed to represent Upham. *Id*. An evidentiary hearing having been held before Magistrate Judge Margaret J. Kravchuk on May 23, 2000 and the parties having submitted post-hearing briefs, I now find that Upham has failed to establish that the conduct of the juror at issue warrants the relief requested. Accordingly, I recommend that the Motion be denied.

I. Background

On September 19, 1997 a jury at the United States District Courthouse in Bangor, Maine found Upham guilty as charged of four counts of computer transmission of child pornography in violation of 18 U.S.C. § 2252(a)(1) and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Superseding Indictment (Docket No. 34); Verdict and Special Interrogatories (Docket No. 67). Upham ultimately was sentenced to a term of seventy-eight months' incarceration on each count, to be served concurrently. Judgment in a Criminal Case (Docket No. 75) at 2.

On October 2, 1997, during trial of a civil case in the same courthouse, the trial judge reported that "[o]ne of the jurors came in and gave the clerk's office a statement orally, and she's reduced that to writing at my request. Basically, this guy said he sat on the Upham case. He sat on the Upham case and he's convinced that Upham, the defendant in that case, is the one who murdered Jon Benet Ramsey,[1] wanted to know when Upham left California, and if he was there around the time of the murder, etc. And I realize it's nothing to do with this case at all, but it suggests that if this if you had this information, you might not have selected him as a juror." Transcript of Proceedings Before the Honorable Eugene W. Beaulieu, United States Magistrate Judge, and a Jury, *Williams v. Ford*, Civil No. 96-72-B (D. Me.), attached to Memorandum, Vol. I at 103-04.

By letter dated March 5, 1998 Diane Sleek, the State of Maine assistant attorney general who represented the defendants in the *Williams* case, informed Upham's trial counsel, N. Laurence Willey, Jr., of the juror's statement.[2] Letter dated March 5, 1998 from Diane Sleek to Laurence N. [sic]

[1]Six-year-old JonBenet Ramsey was found beaten and strangled to death in the basement of her Boulder, Colorado home on December 26, 1996. *See Williams v. Drake*, 146 F.3d 44, 49 n.5 (1st Cir. 1998). The death of the former beauty-contest winner attracted nationwide attention. *Id.*

[2]Sleek requested the juror's ouster, but that request was denied. *See Williams*, 146 F.3d at 49-50. On appeal the First Circuit upheld the denial, noting that (i) the remark evidenced no bias against defendant Williams, and (ii) the remark, "though peculiar, did not in and of itself evince an inability to form rational judgments, particularly since no meaningful context was afforded within which to evaluate the statement." *Id*. at 50.
(continued…)

Willey, Jr., attached to Memorandum. Willey, who by then was no longer counsel for Upham, promptly wrote United States District Judge Morton A. Brody, who had presided over the Upham trial, to disclose this information. Letter dated March 10, 1998 from N. Laurence Willey, Jr. to Honorable Morton A. Brody, attached to Memorandum.

In connection with this disclosure Upham on May 18, 1998 filed four separate *pro se* motions seeking the appointment of counsel, an evidentiary hearing into possible juror bias, a new trial and return to the District Court for the purpose of retrial. Motion for New Counsel (Docket No. 90); Motion for Inquiry and Evidentiary Hearing (Docket No. 91); Motion for New Trial (Docket No. 92); Motion To Be Returned to District Court (Docket No. 93). All were denied on the basis of the untimeliness of the central request for a new trial. Order (Docket No. 96). Upham moved for reconsideration, which also was denied. Motion for Reargument (Docket No. 98); Order on Defendant's Motion for Reconsideration of the Court's Order Denying Defendant's Motions (Docket No. 99). Upham then moved for an extension of time to file an appeal; this too was denied. Motion To Extend Appeal Time (Docket No. 100) and Endorsement thereon. He next appealed the denial of the four motions and of the motion to extend time. Notice of Appeal (Docket No. 101); Notice of Appeal (Docket No. 104). On October 7, 1999 the First Circuit affirmed the denial of Upham's motion to extend time. Judgment (Docket No. 122). This effectively also disposed of Upham's appeal of denial of the initial four motions, which had been untimely filed. *Id*. In the interim, Upham filed the instant motion.

Per my procedural order an evidentiary hearing was held before Judge Kravchuk in which the juror in question was interviewed in the presence of counsel for both Upham and the government. *See*

generally Transcript of Proceedings: Juror Inquiry Before the Honorable Margaret J. Kravchuk, United States Magistrate Judge (Docket No. 137). At the hearing, the juror explained that:

1. About halfway through the Upham trial he formed the opinion that there was a connection between Upham and the Ramsey case, although it was a "mixed opinion[]" in the sense that he "was back and forth on it all the time." *Id.* at 5-6.

2. This opinion was based on Upham's presence in the Boulder, Colorado area close to the time of Ramsey's death and the fact that Ramsey had been a model, leading the juror to speculate that "maybe possibly he [Upham] was there taking pictures of the little girl." *Id*. at 7. "[A]ll kinds of things go through your mind, you know, when you're laying there in bed at night, and you're listening to everything that's going on, and of course, what's going on in the news, and it sticks to you." *Id*. at 12.

3. The opinion did not have any effect on the juror's verdict in the Upham case. *Id*. at 7, 10. The "evidence was there in front of us that we had to look at and go over." *Id*. at 10.

4. The juror shared his opinion regarding the connection between Upham and the Ramsey case with other members of the jury, but only after a verdict was reached. *Id*. at 9.

5. The juror also shared his opinion with Judge Brody at the close of the trial, suggesting that someone should investigate whether a photo of Ramsey was among those taken from Upham. *Id*. at 5, 10-11.

6. About six to nine months after the Upham trial the juror "even called Colorado and told them to look into this case" but did not pursue it when told that the person with whom he was talking could not get into it over the phone. *Id*. at 6, 10.

II. Discussion

In his post-hearing brief, Upham (through counsel) essentially argues that the evidentiary hearing demonstrates that the juror in question was incapable of making rational judgments.

Petitioner's Memorandum Concerning Juror Inquiry (Docket No. 140). In a *pro se* reply brief, Upham raises three additional issues: (i) whether, based on the juror's testimony that he was listening to the news, the juror improperly ignored the admonitions of the court, (ii) whether the juror acted appropriately in conversing with court personnel and the trial judge acted appropriately in not bringing his conversation with the juror to the attention of the parties, and (iii) whether the juror's conduct violated the *Kepreos* order in this case. Petitioner's Second Memorandum Concerning Juror Inquiry (Docket No. 142).

"[A] person incapable of making rational judgments should not be permitted to serve on a trial jury if that disability is called to the judge's attention and a party seasonably requests the juror's removal."[3] *Williams*, 146 F.3d at 50. The First Circuit in *Williams* held that the very remark at issue here did not in itself evince an inability to form rational judgments, although it observed that the comment could not be meaningfully evaluated in the absence of any context, *e.g.*, the details of the Upham case or what prompted the juror's suspicions. *Id*. That missing context (now supplied by this record) makes clear that the juror's thought process, while eccentric, was not irrational. Upham was charged with possession and transmission via computer of child pornography. Ramsey was a child model. The juror recalled that Upham had been in the area of the Ramsey home close to the time of the murder. There is a logical (although far from compelling) connection. Equally as important, the juror stated that his Ramsey theory did not cloud his judgment in the Upham case, volunteering that he had focused on the evidence placed in front of the jury. *See United States v. Vargas*, 606 F.2d 341, 345 (1st Cir. 1979) ("[i]t is well settled that the [sic] only clear evidence of a juror's incompetence to

[3]The word rational "usu. implies a latent or active power to make logical inferences and draw conclusions that enable one to understand the world about him and relate such knowledge to the attainment of ends, often, in this use, opposed to *emotional* or *animal*; in application to policies, projects, or acts, RATIONAL implies satisfactory to the reason or chiefly actuated by reason . . . ." Webster=s Third New International Dictionary 1885 (1981).

understand the issues and to deliberate at the time of his service requires setting aside a verdict.") (citation and internal quotation marks omitted).

Turning next to Upham's argument that the juror may have ignored the court's admonitions concerning news reports, it is not at all clear from the testimony at issue that the juror was listening to news concerning Upham's case. If anything, the context of the juror's remark indicates that he was referring to news about the Ramsey case. In any event, Upham demonstrates no prejudice or bias resulting from whatever exposure to the news the juror may have been referencing. *See, e.g., United States v. Maceo*, 873 F.2d 1, 6 (1st Cir. 1989) (defendant has burden of proving prejudice or jury bias in case in which juror exposed to newspaper article or has other such potentially prejudicial external contact). Similarly, Upham demonstrates no harm flowing from the juror's conversation with a court clerk during the *Williams* trial a communication that did not even occur until approximately two weeks after a verdict was rendered in the Upham case.

Next, even assuming *arguendo* that the juror did inform the trial judge post-verdict of his Ramsey theory and that the trial judge should then have informed Upham's counsel, the error was harmless. The juror explained that the theory did not affect his own judgment with respect to Upham's guilt and that he did not share this theory with other members of the jury until a verdict had been reached. Nor, for the reasons discussed above, is there reason to believe the juror was incapable as a general matter of forming a rational judgment.

Finally, the juror in question did not violate the *Kepreos* order in his asserted post-verdict attempts to contact Colorado or other authorities. A *Kepreos* order bars post-verdict contact by counsel, litigants or their agents with members of the jury except by prior written order of the court. *See* Order Prohibiting Post-Verdict Contact with Jurors (Docket No. 68). It does not regulate post-verdict contacts initiated by jurors.

III. Conclusion

For the foregoing reasons, I recommend that the defendant=s motion to vacate, set aside or correct his sentence be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge=s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court=s order.

Dated this 28th day of June, 2000.

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David M. Cohen
United States Magistrate Judge

MAG ADMIN

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-171

UPHAM v. USA Filed: 07/06/99
Assigned to: JUDGE GENE CARTER
Referred to: MAG. JUDGE DAVID M. COHEN
Demand: $0,000 Nature of Suit: 510
Lead Docket: None Jurisdiction: US Defendant
Dkt# in other court: None

Cause: 28:2255 Motion to Vacate Sentence

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v.

USA

defendant